bers of the public who would avail themselves of the facilities it has to offer.

The High Court would not interfere with the exercise of this discretion, resulting in a refusal to grant exemption from rates by the Council. The area in which an appellate court can overrule the exercise of its discretion by a lower court is very limited, but quite clearly where the lower court's refusal is based on a wrong interpretation of the law, an appellate court can then and perhaps should interfere and exercise the discretion first vested in the lower court: see, *inter alia, Louis Blom-Cooper* v. *Attorney-General.*(6) Here it is obvious that the State Authority has refused to exercise its discretion because of the wrong interpretation given to the section that a columbarium is not a place used exclusively for religious worship and therefore the discretion has been exercised wrongly in the sense that it has been exercised without a full and proper consideration of its scope, or, as one suspects, in the sense that the occasion did not arise for its exercise to be considered. In this view, I am of the opinion that in so far as the rates for 1977 are concerned, the matter should be referred to the State Authority for its decision, in all the circumstances of the case whether or not to extend the discretion which is available to the columbarium.

For these reasons, I would allow the appeal with costs here and in the court below.

Raja Azlan Shah and **Syed Othman F.JJ.** concurred.

Appeal allowed.

Solicitors: *Chandran & Co.; Presgrave & Matthews.*

PERNAS TRADING SDN. BHD. v. PERSATUAN PELADANG BAKTI MELAKA

[F.C. (Raja Azlan Ag. C.J. (Malaya), Wan Suleiman & Salleh Abas F.JJ.) February 2 & March 10, 1979]

[Johore Bharu — Federal Court Civil Appeal No. 58 of 1978]

Contract — Sale of goods — Sales invoice and delivery note showing goods ordered by and delivered to respondents — Defence that goods ordered for third party — Oral evidence to contradict documents.

Principal and Agent — When agent personally liable — Summary judgment.

Practice and Procedure — Application to sign final judgment — No valid defence — R.S.C., 1957, O. 14.

In this case the appellants sued the respondents for the balance of the price of goods sold and delivered to the respondents. In their defence the respondents denied liability and sought to show that the goods were ordered for a third party. The appellants applied for leave to sign final judgment but their application was dismissed by the Senior Assistant Registrar and on appeal against the Registrar's decision, the learned judge dismissed the appellants' appeal. The appellants then appealed to the Federal Court.

Held, allowing the appeal: (1) it was quite clear from the sales invoice and the delivery note that the goods were ordered by the respondents;

(2) the respondents should not be allowed to bring oral evidence to contradict the terms of the contract and to show that the goods were ordered for a third party;

(3) in this case the sales invoice and the delivery note showed that even if the respondents were agents for a third party, Syahazam, in respect of the sale and delivery of the goods they were contracting in such form as to make them personally responsible.

Cases referred to:-

(1) *Higgins* v. *Senior* 151 E.R. 1279.

(2) *Jones* v. *Littledale* 6 Ad. & Ell 486; 1 Nev & P. 677.

The following cases were also cited in argument: *Birkmyr* v. *Darnell* 91 E.R. 27, *Tan Yew Lai* v. *Shadique* [1978] 1 M.L.J. 139, *United Malayan Banking Corporation Bhd.* v. *Datuk Sri Chan Swee Ho* [1978] 1 M.L.J. 222, *Ching Yuen Tung* v. *B.E.P. Akitek* [1978] 1 M.L.J. 211, *Norman Stanley & Co. Ltd.* v. *Siddique* [1956] 1 Lloyds L.R. 312, *Thorne* v. *Steel* [1878] W.N. 215.

FEDERAL COURT.

G.S. Nijar for the appellants.

Zulkifli bin Ismail Mohammed for the respondents.

Cur. Adv. Vult.

Salleh Abas F.J.: In this case the appellants sued the respondents for a sum of $22,997.76 being the balance of the price of chemicals and fertihsers sold and delivered by the appellants to the respondents. In their defence, the respondents denied liability and went on to claim that it was made known to the appellants at the time of the order that the ultimate buyer was Syahazam Sdn. Bhd.; in other words the defendants claimed that in the purchase of these goods they were agents for Syahazam Sdn. Bhd.

The appellants took out summons-in-chambers under Order 14 applying for leave to sign final judgment against the respondents on the ground that the respondents' defence "is sham, vexatious and is merely to delay normal proceedings". The summons came before the Senior Assistant Registrar who dismissed it, and on appeal against the Registrar's decision, Mr. Justice Datuk Syed Othman dismissed the appellants' appeal, and hence the appellants appeal further to the Federal Court.

The appellants' case is founded on the sales invoice dated July 26, 1976, stating that the goods in question were sold to the respondents (Persatuan Peladang Bakti Melaka, 132, Jalan Hang Tuah, Melaka), and on the delivery note of the same date showing that the goods were received by the respondents whose rubber stamp was impressed on the line entitled "Tanda Tangan Penerima Dan Chop Perniagaan". Zainab binti Tamby who signed the delivery note on behalf of the respondents in her affidavit sworn on December 21, 1977, admitted ordering the goods but denied that she did so on behalf of the respondent. She claimed that the goods were in fact "ordered for and on behalf of and on account of Syahazam Sdn. Bhd.". Paragraph 5 of her affidavit says: —

"... the goods referred to in the statement of claim were ordered by me, not on the association's behalf, but for and on behalf and on account of the Syahazam Sdn. Bhd. I now produce a copy of a letter from the said Syahazam Sdn. Bhd. (marked "2 T1") dated October 14, 1977, admitting liability in the plaintiff's claim."

According to Mohamed Noordin bin Haji Daud who swore an affidavit on behalf of the appellants on November 8, 1977, Syahazam Sdn. Bhd. had a separate account with the appellants and were in fact an adjudged debtor to the appellants for the sum of

$19,669.42 in Johore Civil Suit No. 383 of 1977. The letter purports to be written by Syahazam Sdn. Bhd. to the appellants, the material part of which states: —

"Barang-barang ini telah dirancangkan olih Incik Ridzuan bin Hj. Hussain iaitu wakil tuan di-Melaka supaya Akaun akaun tersebut di-masokkan kedalam kira-kira Pertubuhan Peladang Bakti. Ini adalah di-sebabkan credit limit kami pada masa itu telah melebehi dari apa yang dihadkan. Ini adalah salah satu cara bagi Incik Ridzuan bin Hj. Hussain untuk meninggikan jualan barang-barang Kimia di-Pernas Trading dan juga untuk melepaskan dirinya dari menjual barang berlebehan dengan Syahazam Sdn. Bhd."

It is interesting to note that this letter was written not at the time when goods were ordered, but some three weeks after the respondents had been sued; the date of the writ being September 24, 1977 and the date of the letter October 14, 1977. Adverting to paragraph 5 of the affidavit of Zainab binti Tamby quoted earlier, it is clear that she made two propositions: —

(1) -she was not ordering the goods on behalf of the respondents, but

(2) she was ordering them for and on behalf of Syahazam.

As regards the first proposition that the goods were not ordered by her on behalf of the respondents, the sales invoice and the delivery note dated July 26, 1976, clearly contradict her. There is however, no denial by the respondents that the goods were ordered by them and delivered to them. There is also no dispute as to the genuineness of the sales invoice and the delivery note on which the appellants' case is founded. In our view, the respondents' contention that goods were not ordered on their behalf must fail in view of the sales invoice and the delivery note. As regards the second proposition that the goods were ordered on behalf of Syahazam Sdn. Bhd., the respondents relied upon the letter to prove that contemporaneously with the sales invoice and delivery note there was an oral agreement that the respondents were acting as an agent for Syahazam Sdn. Bhd. in order to get over the difficulties of Syahazam Sdn. Bhd. having exceeded their credit limits, and therefore without this sort of arrangements no further goods would be supplied to them. We have earlier observed that this letter was written not at the time when the goods were ordered but some three weeks after the appellants had commenced the suit against the respondents. The contents of this letter therefore amounts to nothing else than an oral evidence which the respondents wish to lead in order to prove the second proposition, i.e. the goods were ordered on behalf of Syahazam, and to support the first proposition, i.e. the goods were not ordered for the respondents, and thus contradict the sales invoice and delivery note. We feel that this course of action is not open to the respondents, as it is clear that under section 92 of the Evidence Act, 1950, oral evidence to contradict, vary, add to or subtract from, the terms of any contract, grant or other disposition of property which has been reduced in writing is not admissible. The sales invoice and the delivery note being the contract reduced in writing between the appellants and the respondents section 92 therefore applies. Hence, no value could be placed on the content of this letter and the affidavit of Zainab binti Tamby pertaining to the goods being ordered by her on behalf of Syahazam Sdn. Bhd.

Further, this case, in our view, falls on all fours with *Higgins* v. *Senior*,[1] in which it was held that in an action on a written agreement, purporting on the face of it to be made by the defendant and subscribed by him for the sale and delivery of goods above the value of £10, it is not competent for him to discharge his liability by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts at the time the agreement was made or signed. What the respondents are trying to do in the present case is exactly what the defendant in *Higgins* v. *Senior* was doing, i.e. to prove by oral evidence that they were contracting with the appellants, not for themselves but for a third party, Syahazam Sdn. Bhd. In our view, this is not a defence to the appellants' claim.

In dismissing the appellants' appeal, Mr. Justice Datuk Syed Othman held that: —

"On the face of the evidence so far shown the respondent has the appearance of being some sort of a double agent, an agent for Syahazam when it accepted delivery of goods. and agent for the appellant when it handed over the goods to Syahazam and received payment made by Syahazam for the goods, and then passed on the payment to the appellant."

If indeed the respondents were a double agent, as the learned judge thought them to be, it is clear that the respondents must be held liable to the appellants. *Bowstead* on Agency, 12th Ed. at p. 109 is an authority on the point, in which the learned author says: —

"EXCEPT in the case of insurance brokers, who are, by usage, personally liable to the underwriters for premiums payable under policies effected by them, no agent incurs any personal liability to his principal in respect of any contract entered into by him on the principal's behalf, and in pursuance of his authority, unless he was acting under a *del credere* commission, *or acted as agent for both parties*, and so contracted a personal liability." (The emphasis is mine).

The learned judge, however, continued to say that in his view —

"The court has therefore to determine the exact nature of the transaction. The invoice and delivery notes may be *prima facie* evidence against the respondent. But that does not mean that the respondent is excluded from adducing evidence of the understanding with the appellant and Syahazam, the third party."

In view of section 92 of the Evidence Act and *Higgins* v. *Senior*, we do not think that this is the correct view to be taken of this case. In our view, it is unnecessary for the court to examine the nature of the transaction any further because, irrespective of whether the respondents were ordering those goods on behalf of Syahazam Sdn. Bhd. the sales invoice and the delivery note plainly show that the respondents were the purchaser and the receiver of the goods, and no one else. Thus, even if they were contracting for and on behalf of Syahazam, we agree with the submission of Mr. Nijar that the respondents are still liable because they were contracting in such form as shows that they are personally liable. Parke B., delivering the judgment in *Higgins* v. *Senior*, quoted with approval the passage in *Jones* v. *Littledale*[2] in which Lord Denman said that: —

"if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his

principals were or were not known at the time of the contract, relieve himself from that responsibility."

In our view, the sales invoice and the delivery note show that even if the respondents were agents for Syahazam in respect of the sale and delivery of those goods, they were contracting in such form as comes within the ambit of what Lord Denman said in *Jones* v. *Littledale*. Thus the respondents are clearly liable. The respondents' case being defenceless, we allow this appeal with costs here and in the court below. The appellants therefore are entitled to sign final judgment in terms of their prayer in the summons-in-chambers No. 847/1977.

Raja Azlan Shah Ag. C.J. (Malaya) and **Wan Suleiman F.J.** concurred.

Appeal allowed.

Solicitors: *Ong Ban Chye & Razak; Zulkifli & Co.*

MOHAMED MUSTAFA v. KANDASAMI (No. 2)

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. & Abdul Hamid J.) March 19 & 20, 1979]

[Penang — Federal Court Civil Appeal No. 126 of 1978]

Practice and Procedure — Leave to appeal to Yang di-Pertuan Agong — Stay of execution.

The respondent in this appeal (see p. 109) applied for conditional leave to appeal to the Yang di-Pertuan Agong and for stay of execution. It was argued that property of the value over $25,000 was involved in the appeal.

Held: (1) as the appeal involved property of the value of $25,000 or upwards leave should be granted to the respondent to appeal to the Yang di-Pertuan Agong on the usual terms;

(2) in the circumstances of this case the respondent ought to be granted stay of execution to maintain the *status quo*.

Cases referred to:-

(1) *Arieh Zvi Lipshitz* v. *Haim Aron Valero* [1948] A.C. 1, 5.

(2) *Meghji Lakhamshi and Brothers* v. *Furniture Workshop* [1954] A.C. 80, 81.

(3) *Becker* v. *Marion City Corp.* [1976] 2 W.L.R. 728, 736-737.

(4) *Oertel* v. *Crocker* [1947] 75 C.L.R. 261.

FEDERAL COURT.

T.R. Hepworth (*V. Thevendran* with him) for the appellant.

R.R. Chelliah (*R.K. Sharma* with him) for the respondent.

Cur. Adv. Vult.

Abdul Hamid J.: The respondent is asking the court to grant conditional leave of appeal to His Majesty the Yang di-Pertuan Agong against the order of the Federal Court made on February 2, 1979, and a stay of execution thereof until the appeal is heard and disposed of.

Mr. R.R. Chelliah, counsel for the respondent, submitted that the appeal involves subject matter respecting property of value exceeding $25,000, and in so far as stay of execution this is necessary in order to maintain the *status quo* and not to make the appeal, if successful, nugatory.

Briefly, the facts are that the respondent is in occupation of the whole of the ground floor of premises known as 743 Penang Street, Penang, and carrying on there an eating shop under the name and style of Sri Kaliaman Vilas Restaurant since July 1974, under a licence in his name.

The appellant is the sub-tenant of the whole of the said premises and also the owner and licence holder of an eating shop on the ground floor called Nava India Restaurant prior to August 1971. The respondent occupied the said ground floor on April 1970, purportedly as sub-tenant and carried on the said business of Nava India Restaurant as lessee of the appellant.

Following a dispute between the respondent and the appellant a writ of summons was filed in the Penang High Court by the respondent claiming that he was tenant of the appellant in respect of the same.

Judgment was given by the Penang High Court on June 30, 1978, in favour of the respondent. On appeal to the Federal Court it was ordered that the respondent deliver to the appellant vacant possession of the said ground floor, the eating shop and restaurant business; pay the appellant sum of $8,500 as agreed mesne profit for the period up to May 31, 1978, and also mesne profit at the rate of $300 per month from June 1, 1978, until delivery of possession.

In his submission Mr. Chelliah referred to subsection (1)(a)(ii) of section 74 Courts of Judicature Act, 1974, stating that the words "like amount or value" which apply to claim or question to or respecting property refer to amount or value of $25,000 or upwards and an appeal shall therefore lie from any final judgment where the appeal involves directly or indirectly, property, not claim or question, of the value of $25,000 or upwards.

In support of his contention Mr. Chelliah cited the case of *Arieh Zvi Lipshitz* v. *Haim Aron Valero*[1] and also the case of *Meghji Lakhamshi and Brothers* v. *Furniture Workshop*[2] where at page 81 it is held that —

"Article 3(a) of the Eastern African (Appeal to Privy Council) Order of Council, 1951, provides that an appeal shall lie as a right from any final judgment of the Court of Appeal 'where the matter in dispute on appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards.'

Under whichever limb of article 3(a) of the Order in Council a case may fall, the 'value' must be looked at from the point of view of the appellant. The present case fell within the latter part of the article which dealt with 'some claim or question to or respecting property... of the said value or upwards,' and on the true construction it was the value of the property, not the value of the claim or question, which was the determining factor. Looked at from the angle of the appellant landlords, the value of the property, vacant possession of which they were claiming, was correctly taken on a capital value basis, which exceeded £500, and therefore under the article an appeal lay as of right."

Meghji Lakhamshi and Brothers v. *Furniture Workshop, supra,* was applied in the case of *Becker* v. *Marion City Corp.*[3] Lord Edmund Davies delivering the judgment of the Board had this to say —

"As their Lordships see it, the problem presently calling for